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## The Perfect Opinion

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# THE PERFECT OPINION

ANDREW JENSEN KERR\*

## ABSTRACT

*In my Article, "The Perfect Opinion," I collate favorite judicial opinions to inductively derive an archetype of perfection. The question of which opinions we like the most is decidedly subjective, but it also reveals implied preferences for creative judging that might not register on citation counts or be prioritized when editing casebooks. Importantly, our choice of a favorite reflects something about us. So why do judges often select non-authoritative opinions (alternative concurrences or dissents) or no-citation opinions (that don't cite to prior case law) when asked of their favorite opinion? We might predict that most judges would select, for example, a Justice Cardozo majority opinion that deftly marshals a wide swath of precedent to justify a remarkable turn in the doctrine.*

*Instead, it seems that at least some judges share a critical perspective that citation is a masking device, and regard over-citation with caution. Despite innovative thinking from academics like Frederick Schauer on the nature and use of authority, this topic remains under-theorized. I contribute to this literature by making a novel observation about implicit authority. Judges who rely on principled reasoning are making both an empirical claim that these principles inform our positive law, and a normative claim that these principles are in fact a better reflection of our law than the "ordinary legal materials" (case law, etc.) we typically work with. This intellectual move requires tacit knowledge and feel, and so it's not surprising these opinions write so effortlessly. These above-great opinions together limn an archetype of perfection that we can use as an ideal form. Not surprisingly, this theorizing echoes the work of Ronald Dworkin, who built his own normative theory of perfection in the construct of Hercules. None of us can be him. But perhaps one of our own has enjoyed the herculean moment. This Article searches for it.*

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## TABLE OF CONTENTS

INTRODUCTION.....	223
I. LIKEABILITY, QUALITY, AND CANON.....	228
II. YOUR FAVORITE JUDGE’S FAVORITE OPINION (IS NOT PERFECT) .....	230
<i>A. The Conventionally Great Opinion</i> .....	230
<i>B. Fun Opinions</i> .....	232
III. DISTINGUISHING AUTHORITY .....	234
IV. CONTRARY AUTHORITY AND WHY WE LIKE IT .....	236
V. DISSENTING FROM FIRST PRINCIPLES.....	239
VI. REASONS AND THEIR LIMITS .....	243
VII. THE EPISTEMOLOGY OF EFFORTLESSNESS .....	247
VIII. HERCULEAN OPINIONS .....	252
IX. REVISIONING <i>LEVESQUE</i> .....	256
X. FUTURE FAVORITES AND THE PROBLEM OF PERFECTION .....	262

*It is strange, indeed, that a law containing such important principles, should be the only one that has never appeared in print. Under these circumstances, to infer a law, as is proposed, would seem to me to savor too much of giving a forced construction to sustain a favorite and preconceived opinion, or to enable us to get over a hard case.*<sup>1</sup>

— Heirs of Ludlow v. Johnson, (1828).

## INTRODUCTION

This Article searches for the perfect judicial opinion. Other writers have had similar ambitions: to catalog the best opinions,<sup>2</sup> to discern the most important opinions,<sup>3</sup> or to rank judges by quality.<sup>4</sup> These determinations inhere a measure of subjectivity, and perhaps involve difficult epistemological questions of aesthetics and taste. Judicial writing is certainly a craft, and our favorite opinions are written with a style that makes them impactful beyond the mere reasoning and logic they contain.<sup>5</sup>

To avoid these subjective aesthetic judgments, other greatness-seeking authors have used objective data like casebook content or citation counts to quantify notions of canon or import. For example, Professors Cross and Spriggs employed sophisticated quantitative and network analyses of citations in their 2010 study, “The Most Important (and Best) Supreme Court Opinions and Justices.”<sup>6</sup> Judge Posner also considered citation counts in his elegant work on connections between judicial quality and reputation, *Cardozo: A Study of Reputation*.<sup>7</sup> It makes sense to use citation as evidence of greatness, especially in a common law system like the United States where the value of a case reference depends in part on the credibility of its judge-author. Implied preferences in judicial quality and impactful writing are each revealed in the decision to cite. We can also see citations; we can count them. This makes citation a very useful heuristic

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1. Heirs of Ludlow v. Johnston, 3 Ohio 553, 558 (1828).

2. E.g., Ross Guberman, POINT TAKEN: HOW TO WRITE LIKE THE WORLD’S BEST JUDGES (2015).

3. E.g., Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407 (2010).

4. E.g., Robert Anderson, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Court of Appeals*, 76 MO. L. REV. 315 (2010).

5. See, e.g., Richard Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1422 (1995) (taking a “stab” at defining style as “what is left out by paraphrase”).

6. Cross & Spriggs, *supra* note 3.

7. RICHARD POSNER, *CARDOZO: A STUDY IN REPUTATION* 69-70 (rev. ed. 1993) [hereinafter A STUDY IN REPUTATION].

for comparing judicial opinions, whereas aesthetic criteria are notoriously difficult to articulate and measure.

This Article does not contest the sensitive use of citation as a measure for quality. And it does not even disagree with the usual lists of great judges, or the usual advice on what makes for great judicial writing. Instead I remind the reader that there is another layer of quality *above* the merely great opinion. First, I disclaim that I fully understand why most judges should aim for competence. Scarce administrative resources, docket management, fear of overrule – these are just a few of the very reasonable concerns that might motivate a judge to craft the competent, if occasionally great, opinion, marked by careful use of citation and a reasoned, effable basis for its holding.<sup>8</sup>

But exploring and unpacking this beyond-great tranche of opinion is not simply an indulgent, academic exercise. I argue that there are important jurisprudential insights that come with searching for perfection, insights which seem to subvert our most core beliefs about judicial writing in a common law system. These opinions are often non-authoritative concurrences and dissents, and, even stranger, they sometimes don't cite to authority at all. What are judges doing when they don't resort to authority? What does it mean for our profession if our favorite opinions, the ones we *like* the most, are crafted in a way that deliberately ignores the rudiments of legal writing? Does this mean that all judges should write with perfection in mind? If not, who should and when should they?

This Article collates favorite opinions to inductively derive an archetype of perfection. The question of which opinions we like most is decidedly subjective and personal, but it also captures implied preferences for creative and erudite judging that might not register on aggregative citation counts or be prioritized when editing didactic casebooks meant to prepare students for the work of lawyering. I limit my search by looking mainly at our favorite judges, but I also catalog a handful of favorite scholars and stylists. And, as will become clear, my data set is further limited by the fact that the question of favorites is rarely asked by

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8. Cf. Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 406-07 (1994) [hereinafter *Publish and Perish*] (commenting on how increased writing burdens have transformed judges “from thinkers to managers”); see also Chad Oldfather, *Of Umpires, Judges and Metaphors: Adjudication in Aesthetic Sports and its Implications for Law*, 25 MARQ. SPORTS L. REV. 271(2014) [hereinafter *Adjudication in Aesthetic Sports*].

Ours is a world that tends to discount that which cannot be easily identified, and one in which judges were long ago deprived of the ability to engage in the sort of leisurely consideration of their cases that the notion of judge-as-craftsperson suggests. Yet while the circumstances in which judges operate have changed, the need to rely on tacit knowledge to do the job has not. *Id.* at 294.

commentators or answered directly by judges or academics. One wonderful exception is *Blackie the Talking Cat: And other favorite judicial opinions*,<sup>9</sup> which should already be on your bookshelf or coffee table. But this book is also made up disproportionately of “fun” opinions.<sup>10</sup> I have delimited those, and other similarly fun opinions, as outside the scope of this project. At its core, this is not an empirical contribution but an analysis of the surprising correlation of favorite opinions with non-authoritative/no-citation opinions. Favorite opinions are non-authoritative/no-citation opinions often enough to be significant.

This is also a topical project. *Youngstown Steel* is again relevant as the U.S. Congress voted in Spring 2019 to express disapproval of President Trump’s plan to direct federal money to constructing the southern border wall.<sup>11</sup> If the U.S. Supreme Court ever considers the constitutionality<sup>12</sup> of his decision, President Trump will hope his appointment, Justice Kavanaugh, affirms his executive power to declare a national emergency. But on Kavanaugh’s mind will be the *Youngstown Steel* precedent, which he declared during his confirmation proceedings to be one of “the four greatest Supreme Court cases in history.”<sup>13</sup> Kavanaugh did not specify whether he was referring to the Black majority opinion or the Jackson concurrence. Black’s opinion might be critiqued as unimaginative and reductive.<sup>14</sup> However, he successfully defended America’s coordinate

9. BLACKIE THE TALKING CAT: AND OTHER FAVORITE JUDICIAL OPINIONS (Ed. West Publishing) (1996).

10. But see Kent C. Olson, *Those Who Play with Cats*, 1 GREEN BAG 2D 217, 218 (1998) (“But focusing simply on humor, or the deficiency thereof, sells *Blackie* short. The preface indicates that there is more here than wit.”).

11. E.g., Jay Michaelson, *It’s Up to Chief Justice John Roberts to Stop Trump’s Border Wall*, THE DAILY BEAST (Feb. 16, 2019), <https://www.thedailybeast.com/its-up-to-chief-justice-john-roberts-to-stop-trumps-border-wall> [<https://perma.cc/3HDT-JHZD>].

12. In July 2019 the U.S. Supreme Court voted 5-4 to permit President Trump to move forward with the construction of the border wall using Defense Department funds. The summary decision seems more responsive to the identities of the plaintiff organizations (the ACLU, Sierra Club, and Southern Border Communities Coalition) and the possibility of irreparable environmental harm. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019); see also Jessica Greko, *Supreme Court: Trump can use Pentagon funds for border wall*, ASSOCIATED PRESS (July 27, 2019).

13. E.g., Brenda J. Linert, *Local steel case important to Kavanaugh*, TRIBUNE CHRONICLE (Oct. 14, 2018), <https://www.tribtoday.com/opinion/editorsdesk/2018/10/local-steel-case-important-to-kavanaugh/> (quoting Senator Susan Collins).

Judge Kavanaugh has been unequivocal in his belief that no president is above the law. He has stated that *Marbury v. Madison*; *Youngstown Steel v. Sawyer*; and *United States v. Nixon* are three of the four greatest Supreme Court cases in history,” Collins said on the Senate floor. “What do they have in common? Each of them is a case where the Court served as a check on presidential power.

*Id.*

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (Frankfurter, J., concurring) (suggesting that the separation of powers issues in this case are “more complicated and flexible” than portrayed by Justice Black’s majority opinion).

system of government and affirmed Congress' lawmaking powers under Article I.<sup>15</sup> This holding – and the courage to make it during the Korean War effort – make it an important decision.

But Kavanaugh was likely thinking of the iconic concurrence from Robert Jackson.<sup>16</sup> Jackson drew on his unique political pedigree to craft a supremely learned and elegant opinion on the nature of executive power in an evolving world. Jackson outlined a now famous three-tiered matrix to identify how the President's Article II powers might combine or compete with Congressional authority.<sup>17</sup> With Congress' vote of disapproval of the border wall, Trump is at his "lowest ebb" of power, at least according to Justice Jackson, and perhaps to Justice Kavanaugh as well.

Justice Jackson's opinion reflects his mastery of constitutional design. But for Professor Sanford Levinson, the Jackson concurrence is more special for its authorial approach than its substantive content. For Professor Levinson, the *Youngstown* concurrence is not just a great opinion but is his *favorite* opinion, because it represents the "best example" of a "self-consciously postrealist encounter with the nature of legal argument." According to Levinson, Jackson, during this reflective process, accurately assessed "the [in]sufficiency of ordinary legal materials" to manage President Truman's steel seizure plans and instead relied on "logic" and "experience" when forming his opinion.<sup>18</sup> The Jackson concurrence is a favorite opinion because of Jackson's ability to look under the surface data points of case law and recognize the unarticulated first principles that animate our way of doing law in the United States. It is a brilliant meditation informed by years of legal work in national security.<sup>19</sup> This first principles approach is evidenced by its lack of citation to conventional authority. The Jackson concurrence includes zero in-text citations. He includes footnotes containing case law support for the scholarly reader. But "above the line" the only precedent-like cases are European nations' recent experience with martial law.<sup>20</sup>

This lead example illustrates the insight and limits of this Article. I might unfairly categorize these beyond-great opinions by clustering

15. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (Black, J., majority opinion).

16. Further evidence that Jackson's concurrence is the likely "greatest" opinion from *Youngstown* is the space he dedicates to it in his 2008 article, Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454 (2009).

17. *Youngstown Sheet*, 343 U.S. at 589, 635-38 (Jackson, J., concurring).

18. Sanford Levinson, *Introduction: Why Select a Favorite Case?*, 74 TEX. L. REV. 1196, 1197 (1996).

19. Cf. A STUDY IN REPUTATION, *supra* note 7, at 140 ("His experience in the upper echelons of government lend a resonance to his public-law opinions.").

20. *Youngstown Sheet*, 343 U.S. at 651-62 (1952) (Kennedy, J., concurring).

“greatest” and “favorite” opinions together as a uniform grouping. To Kavanaugh, the greatest opinion might differ from his favorite. It is also unclear how candid he was being – or could be – in the context of a politically saturated confirmation hearing. Announcing a personal favorite/great is a way to curate a public identity, as illustrated by the billions of social media users who choose to define themselves by their discerning taste in food, fashion, sport, music or art, etc. We might not always be our most honest selves when we are showing off for others.

This Article also offers provocative insights. Our choice of favorite reflects something about *us*.<sup>21</sup> So why do judges often select non-authoritative opinions (alternative concurrences or dissents) or no-citation opinions (that don’t cite to prior case law) when asked of their favorite opinion? We might predict that most judges would select, for example, a Cardozo majority opinion that deftly marshals a wide swath of precedent to justify a remarkable turn in doctrine.<sup>22</sup> Instead, it seems that at least some judges share a critical perspective that citation is a “mask hiding other considerations”<sup>23</sup> and regard over-citation with caution.<sup>24</sup> Despite innovative thinking from Professor Schauer and, most recently, Amy Griffin on the nature and use of authority, this topic remains under-theorized.<sup>25</sup> I contribute to this literature by making a novel observation about implicit authority. Judges who rely on principled reasoning are making both an empirical claim that these principles inform our positive law and a normative claim that these principles are in fact a *better* reflection of our law than the “ordinary legal materials”<sup>26</sup> (case law, etc.) we typically work with. These intellectual moves require tacit knowledge and feel, so it’s not surprising that these opinions write so effortlessly.

21. Indeed, this is likely why prospective federal judges have been asked to supply a list of their favorite opinions as part of their “ideological vetting.” Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 702 (2003).

22. Frank B. Cross, James F. Spriggs II, Timothy R. Johnson & Paul J. Wahlbeck, *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 555 (2010) (citing William H. Manz, *Cardozo’s Use of Authority: An Empirical Study*, 32 CAL. W. L. REV. 31, 31 (1995)) (“One early historical study found that Justice Cardozo ‘cited far more authority in his opinions’ than did his contemporary judges.”).

23. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988).

24. See, e.g., Frank B. Cross, et al., *supra* note 22, at 528 (“If citations are a mask, a Justice might choose to employ a large number of citations so as to better hide the true basis for the decision behind a blizzard of precedent.”). See also Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1932 (2008) (“Legal sophisticates these days worry little about the ins and outs of citation, tending instead to cast their lot with the legal realists in believing that the citation of legal authorities in briefs, arguments, and opinions is scarcely more than a decoration.”).

25. See Griffin, *infra* note 56 and accompanying discussion; Schauer, *infra* note 58.

26. Levinson, *supra* note 18, at 1197.



These above-great opinions together limn an archetype of perfection that we can use as an ideal form. This theorizing echoes the work of Ronald Dworkin, who built his own normative theory of perfection in the construct of Hercules.<sup>27</sup> None of us can be him. But perhaps one of our own has enjoyed the herculean moment. This Article searches for it.

I first consider favorite opinions in the context of other judicial superlatives and chart our favorite opinions in progressively archetypal categories. I quickly discount convention or fun as a model of perfection. Instead, I focus on opinions that reason from first principles and contextualize my thinking within broader debates about the meaning of authority and why judges explain their decisions. I consider several potentially perfect opinions in detail, including the overlooked *Levesque v. Anchor Motor Freight, Inc.*<sup>28</sup> I conclude by questioning the value of perfection in a culture that increasingly permits citation to foreign and non-legal authorities.

### I. LIKEABILITY, QUALITY, AND CANON

My working definition for a favorite is something that we like the most. To like something means we enjoy it, and we can enjoy things for a myriad of reasons. In this way, it is a broad, open-textured word that might be criticized as lacking the nicety of definition we generally prefer when dealing with jurisprudential problems like discerning the platonic manifestation of an ideally formed opinion. “Like” is also an appropriate word because of this same core meaning of enjoyment and its connotations of sincerity and non-instrumentality. We like something not because we are told to or because someone else happens to think it’s important. We like it for the thing-in-itself. In a study of superlative judicial opinions, this kind of contained analysis is essential. Being asked what our favorite is encourages us to select an opinion because of its content separate from its consequence. We don’t think about what it stands for but what it is. A favorite judicial opinion is not reduced to its holding or made a non-literal representation of an adjunct principle that future lawyers or judges have equated it with. Choosing a favorite requires us to think about the opinion in its materiality, its embodiment and with regard for its craftwork.

I focus on judges’ favorites. We can assume that judges have read many judicial opinions and have special insight into the constraints on decision-making. These constraints include the workaday concerns of

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27. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

28. *Levesque v. Anchor Motor Freight, Inc.*, 832 F.2d 702 (1987).

collegiality and compromise in forming an opinion of the court,<sup>29</sup> or the gravity of crafting a text that imbues the coercive force of the state. A judge selects a favorite from shared experience.

This question of a favorite opinion is adjacent to debates on canonicity in the legal academy. We can think of the legal canon as the core group of legal texts that are considered essential reading for law students, lawyers, judges and/or legal academics. The first rigorous look at the legal canon was Professors Balkin and Levinson's "The Canons of Constitutional Law" for the *Harvard Law Review*.<sup>30</sup> An important insight from this article is that there are institutional differences that distinguish the legal academy from the humanities. Legal academics compete with judges and the bar in forming the canon, and law instructors might find it pedagogically important to teach inspiring as well as odious cases. Many constitutional law professors include *Dred Scott v. Sandford* in their syllabi for historical reasons. Few, if any, English professors would bother to include pulp fiction or a novel with Fabio on the cover as an example of what *not* to do. Rather, "[t]he question of what one should teach in English departments is very much connected to the questions of [...] what the 'best' literature is (including what literature has the *best* effects on its readers)."<sup>31</sup>

The necessary equation of exemplar and teaching device in literature is absent in the context of legal education. Casebook editors instead make curatorial decisions to include judicial opinions that reflect a doctrinal point in a particularly accessible or memorable way, perhaps even because there is something about the judge's reasoning that appears droll or is otherwise amenable to critique. Constitutional law is a bit distinctive as compared to the traditional first-year common law subject, and many opinions included in a constitutional law text might have special pedagogic import beyond the mere doctrinal point they make. Constitutional law is also perhaps the most contextual of the first-year subjects, and the historical or evolutive value of the selected constitutional case has no necessary connection to its quality or likeability.

Of course, part of our legal canon is still reserved for superlative opinions. Anita Krishnakumar observed that the "lionization" of the iconic Holmes dissent in *Lochner* was not concurrent to the constructive overrule of the *Lochner* doctrine in 1938.<sup>32</sup> Rather, the first judicial citations to

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29. See generally Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 UNIV. PA. L. REV. 1639 (2003).

30. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

31. *Id.* at 981 (emphasis added).

32. Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 789-90 (2000).

Holmes's dissent “did not surface until the late 1940s.”<sup>33</sup> This delay suggests how the later historical construction of how Holmes’ *Lochner* dissent became a foil to the eponymous *Lochner* doctrine.<sup>34</sup> If there is more than one available judicial opinion to illustrate a doctrinal point (that “liberty” in the Fourteenth Amendment does not include substantive freedom to contract) and if we select a dissent as authority long after it became potentially authoritative, we can fairly guess that this canonization process depends on the style and quality of the selected original dissent. It becomes canonic because it is liked for reasons separate from its doctrinal argument. To this extent, Krishnakumar’s historical claim helps my own cause. After all, Holmes’ *Lochner* dissent is a favorite jurist’s favorite opinion: Judge Posner celebrated it as a “rhetorical masterpiece” in *Law and Literature: A Misunderstood Relation*.<sup>35</sup>

## II. YOUR FAVORITE JUDGE’S FAVORITE OPINION (IS NOT PERFECT)

### A. The Conventionally Great Opinion

I identify four categories of favorite opinions, of which my third and fourth categories (non-authoritative opinions and majority opinions that don't cite to authority) are most important to this Article. The first kind of favorite opinion is the conventional majority opinion – it can be transformative, it can be courageous, and it cites to case law in justifying its argumentative moves. It is perfectly admirable if this sort of favorite is your own! You are in the same company as other favorite judges including Chief Justice John Roberts and late Justice John Paul Stevens. But it is not enough for an opinion to possess moral imagination, have rhetorical might and marshal relevant case law to support its conclusions. This makes for a great, even very great, opinion, but not one that chases perfection.

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33. Krishnakumar, *supra* note 32, at 789.

34. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 248 (1998).

35. RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 298 (1988). See also Primus, *supra* note 34, at 286 (“[P]erhaps Holmes’s most canonical opinion: the *Lochner* dissent.”).

TABLE 1: THE CONVENTIONALLY GREAT OPINION

Favorite Judge	Favorite Opinion	Superlative language	Citations
Chief Justice Roberts	<i>Grubart, Inc. v. Great Lakes Dredge &amp; Dock Co.</i> , 513 U.S. 527 (1995) (Justice Souter)	“one of his favorite opinions” (hearsay) <sup>36</sup>	many
Justice Stevens	<i>Tennessee Valley Authority v. Hiram Hill et al.</i> , 437 U.S. 153 (1978) (Chief Justice Burger) (the “Snail Darter” case)	multiple references to it being “one of his favorites” <sup>37</sup>	many
Justice White (self-citation)	<i>Gaffney v. Cummings</i> , 412 U.S. 735 (1973) (Justice White)	“[o]ne of my favorite cases” <sup>38</sup>	many
Justice Stewart (self-citation)	<i>Rideau v. Louisiana</i> , 373 U.S. 723 (1963) (Justice Stewart)	“[m]y favorite case” <sup>39</sup>	many

36. Joseph Blocher, *Roberts’ Rules: The Assertiveness of Rule-Based Jurisprudence*, 46 TULSA L. REV. 431, 433 n.14 (2011) (citing Jan Crawford Greenburg, *The Gift That Keeps on Giving, Life, Politics and the Law* (March 31, 2008, 3:51 PM), <http://blogs.abcnews.com/legalities/2008/03/the-gift-that-k.html> (“Roberts has said the case is one of his favorite opinions because of what the Court said.”)).

37. Justice Stevens has identified several favorites, but *Tennessee Valley Authority v. Hill* seems to be the only repeat favorite. E.g., Nancy S. Marder, *A Dignified, Inside Look at the Supreme Court – and More Than a Few Surprises*, 95 JUDICATURE 196 (2012); Stuart Taylor, Jr., *Supreme Court: Recalling Favorite Decisions*, N.Y. TIMES, Dec. 3, 1985, at B8, <https://www.nytimes.com/1985/12/03/us/supreme-court-recalling-favorite-decisions.html>. [https://perma.cc/387U-JHJ8]; see also Justice John Paul Stevens, *Random Recollections*, 42 SAN DIEGO L. REV. 269, 273 (2005) (referring to his “two favorites” authored by Chief Justice Warren Burger as *TVA v. Hill* and *Reed v. Reed*). But see Justice John Paul Stevens (Ret.), *Gerald R. Ford Presidential Foundation 2011 William E. Simon Lecture in Public Affairs*, 2012 MICH. ST. L. REV. 1, 6 (2012) (referring to “one of his favorites” being *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

38. Taylor, *supra* note 37, at B8.

39. *Id.*

*B. Fun Opinions*

The second category of favorite opinion is the fun opinion. It can possess charm or whimsy. It may be a case where the judge is handed a remarkable fact pattern, “such as a man suing the devil or himself.”<sup>40</sup> It is *Blackie the Talking Cat*<sup>41</sup> and its ilk. I also include here opinions selected by our favorite judges because the substance of the case was uniquely suited to the idiosyncratic preferences of the judge-author. For example, Justice Blackmun loved baseball (*Flood v. Kuhn*), and Justice Rehnquist loved trains (*Leo Sheep*).<sup>42</sup> These were fun to write, and this enthusiasm often manifests in the quality of the opinion. These are great in all sorts of varied ways, but they don’t chase perfection.

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40. Olson, *supra* note 10, at 218.

41. *Miles v. City Council of Augusta, Ga.*, 710 F.2d 1542 (11th Cir. 1983).

42. E.g., Anita S. Krishnakumar, *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053, 1108 (2009).

TABLE 2: FUN OPINIONS

Favorite Judge	Favorite Opinion	Superlative language	Citations
Justice Blackmun (self-citation)	<i>Flood v. Kuhn</i> , 407 U.S. 258 (1972) (Justice Blackmun; majority)	“favorite” <sup>43</sup>	many
Justice Rehnquist (self-citation)	<i>Leo Sheep Company v. United States</i> , 440 U.S. 668 (1979) (Justice Rehnquist; opinion of the court)	“a case I enjoyed writing as much as any” <sup>44</sup>	many
Justice O’Connor	<i>Florida Dept. of State v. Treasure Salvors, Inc.</i> , 458 U.S. 670 (1982) (joined Justice White’s partial concurrence/partial dissent)	“particularly fond of” this “most unusual and interesting” case <sup>45</sup>	many
Judge Robert Brown (sundry self-citations)	Favorited many of his own “colorful opinions,” including <i>Productos Carnic, S.A. v. Cent. Am. Beef &amp; Seafood Trading Co.</i> , 621 F.2d 683, 685 (5th Cir. 1980)	“I received a batch of his favorite opinions” (hearsay, but from a former clerk) <sup>46</sup>	many
Judge Gerald Lebovits	<i>Robinson v. Bayerque</i> , 5 Cal. 460, 1855 WL 814 (Cal.) (Justice Heydenfeldt)	“a California classic” <sup>47</sup>	Zero
N/A (Judge Lebovits derides)	<i>Denny v. Radar Industries</i> , 28 Mich.App. 294 (1970) (Judge Gillis)	N/A. “But brevity is vice if it leads to inadequate explanation.” <sup>48</sup>	One

43. Major Emily C. Schiffer, *Book Review*, 187 MIL. L. REV. 174, 179-80 (2006) (citing *Transcript of the Justice Harry A. Blackmun Oral History Project: Interviews with Justice Blackmun, Conducted by Professor Harold Hongju Koh*, YALE LAW SCHOOL at 18 (July 6, 1994-Dec. 13, 1995).

44. Taylor, *supra* note 37, at B8.

45. *Id.*

46. Robert Klonoff, *Memories of a Law Clerk*, 47 HOUSTON L. REV. 573, 576-77 (2010).

47. Gerald Lebovits, *Short Judicial Opinions: The Weight of Authority (continued)*, 76-SEP N.Y. ST. B.A.J. 60 (2004).

48. *Id.*

## III. DISTINGUISHING AUTHORITY

The third and fourth sorts of favorites are most provocative and inform the theorizing in this Article. These are respectively non-authoritative opinions (alternative concurrences and dissents) and majority opinions that don't cite to authority. I first bring some clarity to this notion of authority in legal argumentation. A common pedagogical move is to distinguish the "binding" case as authoritative from the merely "persuasive" case or academic article etc., which we cite to because of its quality of thought and relevance in content. What makes a case binding is its vertical hierarchy within our own jurisdiction or, in certain contexts, the horizontal force of the same court of appeal within that same jurisdiction (what we refer to as *stare decisis*).<sup>49</sup> If a legal text is authoritative, we are bound by it for content-independent reasons.<sup>50</sup> These include institutional values of predictability and consistency, Burkean prudence, and even ancestral ideas of respect for the past associated with Anthony Kronman.<sup>51</sup> We don't care if the prior case law is normatively good or bad, well-reasoned or sophistic, efficient or archaic, etc. We are indifferent to the substance of the opinion; we cite it because we feel obliged.<sup>52</sup>

If this is what defines authoritativeness, then our separate universe of persuasive materials must instead be cited only for its quality of thought. Those materials are instructive for the court because they contain good ideas and are apposite to the present case. This ever-expanding universe of non-authoritative materials includes things like case law from outside our home jurisdiction, foreign case law from another national court,<sup>53</sup> legal scholarship, your dictionary,<sup>54</sup> social science,<sup>55</sup> and other "modern authority" such as the famous Dr. Kenneth and Mamie Clark doll

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49. E.g., Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1455 (2010). See, e.g., GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 259 (2010) ("Repeatedly, Hand regretted the injustice of certain laws even while he felt bound to apply them.").

50. Professor Merryman cataloged many of these reasons – including ancestor worship – with notable pith in John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 621-626 (1954) [hereinafter *Authority of Authority*].

51. E.g., Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

52. Cf. Heirs of Ludlow v. Johnston, 3 Ohio 553, 567 (1828); Milor v. Farrelly, 25 Ark. 353, 363 (1869) ("[T]he meaning of words, sentences, and phrases must not be distorted in order to sustain a favorite opinion."). See also McKibbin v. Martin, 64 Pa. 352, 361 (1870) ("[A] judge has no right to adhere to his own favorite opinions, after they have been reversed or overruled.").

53. See, e.g., Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59 (2009).

54. See, e.g., Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999).

55. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 488-95 (1986).

experiment from *Brown v. Board of Education*,<sup>56</sup> unpublished authority,<sup>57</sup> and, maybe most controversially, *Wikipedia*.<sup>58</sup> Alternative concurrences and dissents that have not yet “ripened” into doctrine also fall in this universe. However useful this binary of binding/persuasiveness is as an introductory teaching lens for the young lawyer, Frederick Schauer has convincingly shown that it is conceptually flawed.<sup>59</sup> In practice, this kaleidoscope<sup>60</sup> of persuasive materials is not cited simply for the materials’ ideas but because these materials possess a weight attached to the credibility of the author. Lawyers and judges cite them not just because of what they say but because of who said it. These materials function as cognitive authority to the extent we trust the author as a valid source.<sup>61</sup> These mislabeled “persuasive” materials are thus cited to for content-independent reasons as well and blur with our conventionally authoritative case law (on-point prior majority opinions from within our jurisdiction).

Schauer instead uses the lexicon of “optional authority” to describe the elective use of academic commentary or case law from a neighboring jurisdiction.<sup>62</sup> Amy Griffin uses this same prism in her contextual approach to teaching legal argument.<sup>63</sup> Still, whatever we call it, there is an assumption here that legal writers need to cite some kind of authority to justify the main argumentative moves they make. Citing to optional authority like dissents might be a suboptimal choice for a judge, but refusing all authority is just puzzling. We might question if a judge is even intelligibly doing what we think of as “legal reasoning” when she avoids use of citation altogether – is there a source of law for a decision without citation? Even Justice Breyer writing at the U.S. Supreme Court, where indeterminacy claims of legal realism “are at their acme,”<sup>64</sup> sensed an obligation to reach for optional foreign authority from Zimbabwe<sup>65</sup> to

56. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 n.11 (1954).

57. Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 78-79 (2018).

58. Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1, 36 (2009). See also Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. REV. DISCOURSE 27, 48-53 (2010); Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 920 (2011).

59. Schauer, *Authority and Authorities*, *supra* note 24, at 1941 (“For once we understand that genuine authority is content-independent, we are in a position to see that persuasion and acceptance (whether voluntary or not) of authority are fundamentally opposed notions.”).

60. Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. 1673, 1690 (2000) (referring to our new “kaleidoscope of sources”).

61. *Id.* at 1676 (“By ‘cognitive authority’ I mean the act by which one confers trust upon a source.”).

62. Schauer, *Authority and Authorities*, *supra* note 24, at 1952.

63. Griffin, *supra* note 57.

64. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 646 (1995).

65. *Knight v. Florida*, 120 S.Ct. 459, 463 (Breyer, J., dissenting).



justify his dissent from denial of certiorari in *Knight v. Florida*: “I want to do this thing; I have to think of some reason for it. I have to write something that—you know, that sounds like a lawyer. I have to cite something. . . . what am I going to use?”<sup>66</sup> Is “nothing” a valid response to Justice Breyer?

#### IV. CONTRARY AUTHORITY AND WHY WE LIKE IT

I thus turn to my third category of favorite opinion: the concurring or dissenting opinion. I distinguish non-majority from majority opinions (including, of course, opinions for the court) in this Article given the different discourse contexts and generic expectations of each text. Jurists disproportionately select non-majority opinions as their favorites.<sup>67</sup> At first blush, this is curious. In our colloquial sense of the word, it feels anti-authority for an institutional actor like a judge to select these “subversive” opinions.<sup>68</sup> We would expect judges and academics to select opinions that were consequential, and non-governing concurrences and dissents are by definition *not*, at least until they ripen as prior reasoning for a turn in the doctrine. But from a discursive perspective it’s not surprising that non-majority opinions are favored. They are written with a vital purpose and for a future audience.

Concurrences and dissents are written to expand and critique and not necessarily to justify or explain. This structural posture allows the author to write by implicit reference, and to ignore points of argument that are rote (procedure, syllogistic reasoning) or to retreat from gaps or vulnerabilities in her own argument. The concurring or dissenting author can be selective in what she includes, and this allows for a level of improvisation or dialectic that would be problematic in the context of a majority opinion. The concurring or dissenting author can take a surgical approach to critiquing only those points where her argument is most compelling.<sup>69</sup> This allows her to write with pith. Nor does she have to

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66. Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 531 (2005). See also Emily Bazelon, *What Would Zimbabwe Do?*, THE ATLANTIC (Nov. 2005), <http://www.theatlantic.com/magazine/archive/2005/11/what-would-zimbabwe-do/304298/> [<https://perma.cc/DZ3X-AX28>].

67. See *infra* SECTION V. DISSENTING FROM FIRST PRINCIPLES.

68. Robert Bendiner, *The Law and Potter Stewart: An Interview With Justice Potter Stewart*, 35 AM. HERITAGE (Dec. 1983), <https://www.americanheritage.com/law-and-potter-stewart-interview-justice-potter-stewart> [<https://perma.cc/CQ8Y-SX9T>], (“[W]hen I went to law school we had a professor who said dissenting opinions are nothing but subversive literature.”).

69. Cf. Merryman, *supra* note 50, at 665 (“[A] dissent or concurring opinion is usually limited to discussion of only some of the points considered in the majority opinion.”).

provide a fully reasoned basis for her decision. She can avoid the expository style of a majority opinion, because she does not have the managerial burden of providing instructive guidance to lower court judges, or the bar, or other readers who might be basing their counsel or behavior on the contours of the majority holding. It is the personal appeal of the judge, in which she can communicate as an individual and not simply as an institutional voice. These elements would seem to make this genre of opinion much more likeable, but of course I suffer from selection bias. Richard Primus reminds us that “part of the reason why we think of dissents as being well written is that we only read the good ones.”<sup>70</sup> We have little reason to remember a stale opinion.

We can make a broad distinction between these institutional and personal voices in opinion writing. First, I remind the reader that the institutional voice is not all bad. Justice Scalia, himself a vivid dissenter, remarked that although writing the dissent might be more fun to author “because [...] it’s yours,” he would much rather be part of the majority.<sup>71</sup> Of course, the majority author “wins,” for lack of a better verb. But she can also make use of writing strategies as majority author that empower her voice and provide it an institutional gravity that shapes reader perceptions of her judicial opinion – and our legal method – as neutral and objective. Robert Ferguson first outlined the generic (genre-based) requirements of the judicial opinion.<sup>72</sup> Two genre elements of the majority opinion that are particularly useful to the majority author are what Ferguson described as the “monologic voice” and the “rhetoric of inevitability.”<sup>73</sup> These pair to create an atmosphere in which the author’s reasoning is ineluctably sound and correct. The majority author can frame the legal question to suit her own analysis and construct an argument that anticipates counter-responses in a way that she can easily manage. The feint is that the counter is acknowledged, but it’s never damning. The majority author remains in control of the outcome.

Catherine Langford extends this academic discussion of judicial genre to the context of dissents.<sup>74</sup> In contrast to majority opinions, dissents possess an “individualistic tone” and use an “advocacy medium.”<sup>75</sup> They

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70. Primus, *supra* note 34, at 267.

71. *Supreme Court Justice Scalia*, C-SPAN (June 19, 2009) (at 26:30), <https://www.c-span.org/video/?286079-1/supreme-court-justice-scalia> [<https://perma.cc/4N2J-6GN7>].

72. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. (1990).

73. *Id.* at 204.

74. Catherine L. Langford, *Toward a Genre of Judicial Dissent: Lochner and Casey as Exemplars*, 9 COMM. L. REV. 2 (2009).

75. *Id.* at 1 (2009).

are written not to explain or justify, but to persuade. To persuade the *future*. The unique audience of the dissent (and I argue concurring opinions can be included here as well) provides these opinions a transcendental context that encourages the author to tap into the first principles of our legal system. In this expanded horizon, the case law reference transforms from the authoritative text-in-itself to a data point reflection of more fundamental currents in the law. This echoes the historical citation to “custom” in our Anglo-American legal tradition.<sup>76</sup> It suggests that the amorphous space where black-letter doctrine transmogrifies into general principle.

For all of these reasons – its surgical approach to critique; lack of need for expository writing; transcendental context – the concurring or dissenting opinion often includes fewer citations to case law. It might be that our favorite jurists select these opinions for reasons that are separate from the discrete fact they lack citation. Our favorite jurists would not necessarily be validating this intuitive approach to legal argument. But it also seems true that they don’t mind their lack of citation either. Certainly, they have many great candidate opinions to choose from, and sparse citation is an easy way to ding one and facilitate the process of elimination. But low-citation opinions are favorited anyway, despite an intuitive approach to argument construction that could be derided as lacking rigor or respect for the integrity of our legal system and common law method.

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76. See A.W.B. Simpson, *The Common Law and Legal Theory* in OXFORD ESSAYS IN JURISPRUDENCE 119, 131-34 (1973).

TABLE 3: CONCURRENCE AND DISSENTS

Favorite Jurist	Favorite Opinion	Superlative language	Citations
Justice Scalia	<i>Korematsu v. United States</i> , 323 U.S. 214 (1944) (Justice Jackson; dissent)	“favorite” (hearsay) <sup>77</sup>	One
Justice Brennan	<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896) (Justice Harlan; dissent) <sup>78</sup>	“masterful dissent”	Several, but it’s a longer opinion
Justice Kavanaugh; Sanford Levinson	<i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952) (Justice Jackson; concurrence)	“one of the four greatest opinions” (Kavanaugh); “my favorite” (Levinson)	Zero “above the line,” but many footnotes
Judge Posner	<i>Lochner v. New York</i> , 198 U.S. 45 (1905) (Justice Holmes; dissent)	“a rhetorical masterpiece”	Several, and it’s a short opinion
Judge Lebovits	<i>Abrams v. United States</i> , 250 U.S. 616 (1919) (Justice Holmes; dissent)	“his greatest dissent”	Zero, but maybe four
Judge Justice	<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965) (Justice Goldberg; concurrence)	“my favorite opinion” <sup>79</sup>	Many, but still a novel meditation on the 9 <sup>th</sup> Amendment
N/A (still un-favored)	<i>People v. Chessman</i> , 35 Cal.2d 455, 218 P.2d 769 (1950); <i>Weber v. Superior Ct.</i> , 35 Cal.2d 68, 216 P.2d 871 (1950); <i>Central Contra Costa Sanitary Dist. v. Superior Ct.</i> , 34 Cal.2d 845, 215 P.2d 462 (1950) (all dissents authored by Justice Jesse W. Carter of the Supreme Court of California (1939-1950))	N/A. Professor Merryman is unsure how to interpret this lack of citation. He supposes Justice Carter agreed with the majority’s selection of cited authority, but not its application of cited authority to the facts in dispute. <sup>80</sup>	Zero

77. Bob Egelko, *Scalia’s Favorite Opinion? You Might be Surprised*, SFGATE (Oct. 30, 2015, 9:00 A.M.), <http://blog.sfgate.com/politics/2015/10/30/scalias-favorite-opinion-you-might-be-surprised/> [https://perma.cc/B9QW-7B46]. But see Robert P. Mosteller, *Confrontation in Children’s Cases: The Dimensions of Limited Coverage*, 20 J.L. & POL’Y 393, 396 n.7 (2012) (citing to JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 317 (2007) as evidence that Scalia has described *Crawford v. Washington* as his favorite opinion).

78. But see Justice John Paul Stevens, *Random Recollections*, 42 SAN DIEGO L. REV. 269, 275 (2005) (Justice Stevens tells us: “Bill’s contribution to the work of the Court is legendary. I think I remember him saying that *Goldberg v. Kelly* was his favorite opinion.”). I include this contrary point here for reference, but I note this is technically hearsay, even if coming from an icon like Justice Stevens. Justice Brennan preferred to be a bit opaque on the topic of his favorites. An 1987 ABA profile suggests he often deflected with a charming analogy: “He refuses to name the Court decision of which he is most proud, or his favorite opinion, using a standard line: ‘You might as well ask which of my children I prefer.’” David O. Stewart, *Justice Brennan at 80*, A.B.A. J. 61, 63 (1987). See also Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 445 n.266 (2004).

79. William Wayne Justice, *Recognizing the Ninth Amendment’s Role in Constitutional Interpretation*, 74 TEX. L. REV. 1241 (1996).

80. Merryman, *supra* note 50, at 665 (1954).

## V. DISSENTING FROM FIRST PRINCIPLES

I begin my discussion of favorite dissents with Justice Holmes' iconic opinion in *Abrams*. The prolific Judge Gerald Lebovits of the Supreme Court of New York has taught legal writing courses at seemingly every New York-area law school and has authored literally hundreds of publications on legal writing. In footnote 24 of "Short Judicial Opinions: The Weight of Authority" he tells us:

Justice Holmes once wrote an opinion that cited not a single case. See *Springfield Gas & Elec. Co. v. City of Springfield*, 257 U.S. 66 (1921). In *Abrams v. United States*, 250 U.S. 616, 624 (1919), his *greatest* dissent, he again cited no case.<sup>81</sup>

Today we remember *Abrams* as the first articulation of a "marketplace of ideas" approach to freedom of expression. It is a brilliant metaphor that embeds fundamental truths about modern life (we're all fallible, truth is relative, let's listen to each other, etc.) into the text of the First Amendment.<sup>82</sup> There is no prior case law for this position, but Holmes reassures us that the free trade of ideas "at any rate is the theory of our Constitution."<sup>83</sup> He does not need to justify his framing of the problem here in *Abrams* or detail reasons to explain why his theory is indeed the only valid theory of the Constitution on this point. Because of his reputation and his personal approach to writing, we *trust* him and don't ask for additional justification to test the validity of his claims or the accuracy of his perspective.

Holmes' next argumentative move is equally brilliant, as he steps outside his role as judge and comments as a participant-observer on the special challenges of freedom of expression in the context of democratic self-government:

[Our Constitution] is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon

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81. Lebovits, *Short Judicial Opinions: The Weight of Authority*, *supra* note 47, at 60 n.24 (2004) (emphasis added). Oliver Wendell Holmes, Jr. also shares the title of the Great Dissenter, and so there is an exponent of greatness here. *E.g.*, *Oliver Wendell Holmes, Jr.*, ENCYCLOPAEDIA BRITANNICA (last visited June 22, 2019), <https://www.britannica.com/biography/Oliver-Wendell-Holmes-Jr> [<https://perma.cc/8KAF-GRP6>] ("byname The Great Dissenter"). The first Harlan is the other titleholder. See Eric Schepard, *The Great Dissenter's Greatest Dissents: The First Justice Harlan, the "Color-Blind" Constitution and the Meaning of His Dissents in the Insular Cases for the War on Terror*, 48 AM. J. LEGAL HIST. 119 (2006).

82. See Andrew Cohen, *The Most Powerful Dissent in American History*, THE ATLANTIC (Aug. 10, 2013), <https://www.theatlantic.com/national/archive/2013/08/the-most-powerful-dissent-in-american-history/278503/> [<https://perma.cc/48FX-S7MV>].

83. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death ...<sup>84</sup>

Holmes nears the proverbial fourth wall as a writer and has his own “postrealist encounter” with the nature of legal argument (Levinson). He transcends his Olympian detachment,<sup>85</sup> and he transcends the text of the First Amendment, to form a general theory of freedom of expression based in the very real truth that judges – like those they judge – have limited knowledge and are engaged in a social project<sup>86</sup> (constitutional construction) that lacks a model or blueprint. This reader-aware, exploratory approach makes it a paradigm example of the “impure” style of opinion writing described by Judge Posner in “Judges’ Writing Styles (And Do They Matter?).” The impure style aims to be conversational, accessible, concise and – this is the hardest part – *effortless*.<sup>87</sup> Importantly, the impure stylist considers the layperson.<sup>88</sup> This consideration provides a conceptual link for us to connect the reasoning with the aesthetics of first principles opinion writing: the impure stylist must generalize core truths rather than obscure her reasoning with jargon or insider references such as case citations. Indeed, in a separate article, Judge Lebovits specifically warns the would-be impure stylist against under-citing her opinions: “[i]mpurists tend not to cite enough authority.”<sup>89</sup> Though Holmes, of course, does not need to follow the prescriptions for a newbie judge (or clerk). And certainly not when writing in dissent.

Another interesting choice from Judge Lebovits is to label this as a no-citation opinion. Per my count, the *Abrams* dissent contains four case law references. However, these function as illustrative asides, as a sort of namedrop. For example, Holmes mentions in passing *Swift & Co.*, in

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84. *Abrams*, 250 U.S. at 630.

85. *E.g.*, GUNTHER, *supra* note 47, at 294 (“While Holmes read widely and engaged fully in the intellectual life of his times, his was an attitude of remote, Olympian detachment: he was rarely interested in contemporary political battles or concerned about their outcome.”).

86. *E.g.*, Larry Kramer, *We the People*, BOS. REV. (Feb./Mar. 2004) <https://bostonreview.net/archives/BR29.1/kramer.html> [<https://perma.cc/TL4S-NFSW>]; *see also* Paul W. Kahn & Kiel Brennan-Marquez, *Statutes and Democratic Self-Authorship*, 56 WM. & MARY L. REV. 115 (2014).

87. Posner, *supra* note 5, at 1430-31 (“Paradoxically, the impure judicial stylists generally take more pains over style than the pure stylists do. Unless one is a particularly gifted writer, it takes much effort to make an opinion seem effortless!”).

88. *Id.* at 1431.

89. Gerald Lebovits, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 284 (2008).

which he previously articulated his theory of criminal intent.<sup>90</sup> We can make the semantic distinction that here this cited “authority” does not exert content-independent force on his own thinking. It does not directly persuade or inform but is instead a mere illustration of a principle that stands apart from the cited case. The other three cited cases (*Schenck*, *Frohwerk*, and *Debs*) were also authored by Holmes and suggest the impression of a string citation, or the shared assumption that this doctrinal point is settled law, and “not a big deal” worth fussing over with actual deliberation. The cited authority in *Abrams* does not frame or inspire Holmes’ own response to the presented legal conflict. These citations, however, still leave footprints so that readers can situate Holmes’ dissent within a broader network of case law. The prior cases help identify what sort of opinion this is, even if the identity of this opinion (as the theory of the marketplace of ideas) has little to do with the cited case law.

We see a similar use of authority in the favorite opinion of Justice Scalia. In his *Korematsu* dissent, the only case that Justice Jackson refers to is the Japanese-American curfew case, *Hirabayashi*, not as a model of reasoning but instead to cabin its relevance and suggest that the Supreme Court should not repeat its earlier mistake of affirming this targeted curfew.<sup>91</sup> Jackson made a comparable move in his *Youngstown Steel* concurrence. His intentional choice to maroon all case law citations subjacent the actual text of the opinion to the footnotes suggests that while they illustrate his thinking, these cases should not be confused as the reasoned basis for his standalone concurrence.

In Justice William Brennan’s *In Defense of Dissents*, Brennan spends most of his essay honoring one dissent in particular, “the first Justice Harlan’s remarkable dissent in *Plessy v. Ferguson* [which] is at once prophetic and expressive of the Justice’s constitutional vision, and, at the same time, a careful and methodical refutation on the majority’s legal analysis in that case.”<sup>92</sup> For Brennan, this is a “masterful dissent,” but it is also a dissent that relies on sparse case law. Indeed, in the second section of the opinion on racial equality, Harlan includes only an efficient string citation to the line of jury cases after *Strauder* and a quotation to *Gibson v. State of Mississippi* for the broad principle of equality before the law.<sup>93</sup>

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90. *Abrams*, 250 U.S. at 628 (citing *Swift & Co. v. U.S.*, 196 U.S. 375 (1905)).

91. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

92. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431 (1986).

93. *Plessy v. Ferguson*, 163 U.S. 537, 555-64 (1896) (Harlan, J., dissenting). *But see* Gabriel Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) (for an exploration of Harlan’s own prejudice to Chinese Americans as reflected in *Plessy* and *United States v. Wong Kim Ark*).

The only citation over the next seven pages is to an *anti-canonic* case to avoid comparison to: *Dred Scott*.<sup>94</sup> According to Brennan:

In his appeal to the future, Justice Harlan transcended, without slighting, mechanical legal analysis; he sought to announce fundamental constitutional truths as well. He spoke not only to his peers, but to his society, and, more important, across time to later generations. He was, in this sense, a secular prophet, and we continue, long after *Plessy* and long even after *Brown v. Board of Education*, to benefit from his wisdom and courage.<sup>95</sup>

Justice Harlan writes from a transcendental purview for a future audience. In Brennan's words, he is writing as a "secular prophet:"<sup>96</sup> not from the contextualized perspective of a doctrinalist but with the core values and spirit of the Reconstruction Amendments, in particular, and the Constitution, more generally, in mind. It is written from first principles.

## VI. REASONS AND THEIR LIMITS

Despite our conditioning as common law lawyers, it is not surprising that these no-citation or low-citation opinions are our favorites. They simply write better – they are lighter, crisper, more vibrant, more natural. Footnoting is skullduggery,<sup>97</sup> but in-text references can clutter. They complicate. They obscure the actual thinking of the writer by substituting a contextual event for a proposition it is supposed to reflect. They pull the author away from the opinion she would otherwise craft. Judges quip, "it won't write," to express frustration when their vision of an opinion does not have supportive case law.<sup>98</sup> Precedent is an obstacle for the writer. Sure, it is an obstacle that judges are used to confronting. The wise and strategic use of case law can be its own kind of craft, as best seen in the elevated "pure" style of Cardozo. Nonetheless, in this Article, I am focused on the above-great tranche of opinion. I am chasing the perfect

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94. E.g., Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

95. Brennan, *supra* note 92, at 432.

96. *Id.* at 432.

97. Arthur Austin, *Footnote Skullduggery and Other Bad Habits*, 44 UNIV. MIAMI L. REV. 1009 (1990).

98. E.g., Schauer, *Authority and Authorities*, *supra* note 24, at 1951 (2008); Chad M. Oldfather, *Writing, Cognition and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1284-85 (2008); Posner, *supra* note 5, at 1447.



opinion, which can't be interrupted with a distracting reference or distorted to maintain doctrinal integrity.<sup>99</sup>

At a more threshold level, we can ask when we should bother to write a judicial opinion *at all*, let alone cite something. Certain kinds of legal thinking evade articulation, and the quality of our judicial opinions might be lessened if judges are forced to wrestle with these tensions between human cognition and language. In *Writing, Cognition, and the Nature of the Judicial Process*, Chad Oldfather introduces the concept of verbal overshadowing, or our tendency to cite to articulable reasons to explain our decisions even when they are actually based on less effable reactions.<sup>100</sup> We can posit that it's sometimes worse to provide a false reason, or distort our thinking to contrive an articulable reason, than to simply avoid the bothersome problem of explaining these sorts of gestalt decisions at all; for example, the kind of complex, contextual decisions that typify factual determinations.<sup>101</sup> Fortunately, our legal institutions comport fairly well with our needs for either written or unwritten decision-making. Juries try facts, but they don't narrate their reasoning. The bench decisions made by trial judges (regarding witness credibility, probative value of potentially prejudicial evidence etc.) do not generally require a recorded opinion or even oral justification. But we can expand to question whether judges are being asked to construct doctrine around similar kinds of gestalt intuitions or are expected to rationalize framing decisions that rely on tacit knowledge.

One doctrinal example of overshadowing might be our Fourth Amendment jurisprudence on search and seizure. In a candid C-SPAN interview, Justice Scalia poked fun at his earlier disagreements with Justice Rehnquist as to whether a constitutional search case was a "plum assignment" or instead a "dog."<sup>102</sup> Scalia argued that the typical Fourth Amendment case does not present a discrete legal question but is instead an iterative factual permutation ("variation three thousand five hundred

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99. Cf. Oldfather, *Writing, Cognition, and the Nature of the Judicial Process*, *supra* note 98, at 1331 ("We might be willing to tolerate suboptimal assessments of the appropriate content of doctrine in order to promote certainty and to facilitate a stable regime of precedent.").

100. *Id.* at 1310-11.

101. *Id.* at 1286-87.

Sometimes, in other words, requiring an opinion would lead to a worse decision. Primarily these will be decisions that turn largely on the assessment of complex, fact-intensive situations in which largely inarticulable, context-based judgments matter more than precision and technical analysis, the sorts of decisions, in other words, as to which judges often do not issue opinions.

*Id.*

102. *Supreme Court Justice Scalia*, *supra* note 71, at 23:30.

and forty-two” to quote Scalia<sup>103</sup>) best suited for a jury’s evaluation and disposition. Even if gifted judges like Scalia can articulate a reasoned justification to resolve such cases based on gestalt, the opinions are unlikely to be natural or effortless (i.e. perfect).

In part, this is because of the tension between doing and explaining. As Michael Polanyi famously observed, “we can know more than we can tell.”<sup>104</sup> Or, we have “tacit knowledge” that is difficult to precisely articulate. Polanyi used the example of bicycle riding to capture the truth that we have difficulty explaining many quotidian activities that we are seemingly very competent at.

Our very best judges have this same tacit knowledge in regard to case framing. By framing, I mean the threshold determination of deciding what sort of case it is.<sup>105</sup> This is sometimes referred to as issue diagnosis. Karl Llewellyn also referred to this as a kind of “situation sense” or “horse sense.”<sup>106</sup> To continue our metaphor, Dan Kahan employed the remarkable example of the chick sexer to analogize the work of lawyers.<sup>107</sup> Sadly, male chicks are not very useful to egg farmers, and it’s apparently economical for farmers to pay chick sexers a fairly handsome income to immediately identify and separate them. In their infancy, male chicks are effectively indistinguishable from female chicks, but the professional chick sexer develops techniques of pattern recognition so that she can efficiently identify the male chick even if she cannot readily explain what she is doing or how she does it. To abstract, she is distinguishing cases but is unable to explain the reasons that justify her choices.

Fortunately for the chick sexer, she is not paid to provide reasons for why she identifies a chick’s sex. However, for lawyers and judges, explanation is a core part of their job descriptions.<sup>108</sup> James Boyd White asked us to speculate on a world without judicial opinions and how it might resemble the direct democracy of Classical Athens, whose legal system was essentially the unexplained votes of its citizenry on sundry

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103. *Supreme Court Justice Scalia*, *supra* note 71, at 23:30.

104. *Adjudication in Aesthetic Sports*, *supra* note 8, at 278.

105. Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 53 (2010) (“The exercise of judgment pervades the creation and application of legal standards in a way that is not true of math. There are indisputably correct answers in math, but not (or at least not always) in law.”).

106. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 214 (1960).

107. *Adjudication in Aesthetic Sports*, *supra* note 8, at 292-93; *see also* Dan M. Kahan, *Yale Law School Commencement Remarks*, ADDRESS AT THE YALE UNIVERSITY LAW SCHOOL COMMENCEMENT, <https://digitalcommons.law.yale.edu/ylsca/27> [<https://perma.cc/M33T-4EHX>] (last amended May 25, 2006). *See also* David Beckett, *Learning to Be – At Work*, in “BECOMING” A PROFESSIONAL: AN INTERDISCIPLINARY ANALYSIS OF PROFESSIONAL LEARNING 57, 63-64 (referring to literature on chick sexing, apprenticeship and tacit knowledge).

108. *E.g.*, Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE UNIV. L. REV. 525, 527 (2009) (“Judges also generally explain their decisions...”).

matters.<sup>109</sup> It would certainly be different from our own common law system, where the reasons in support of a holding have as much as precedential effect as the decision itself. Professor Schauer observed that the reasons judges provide to justify their decisions don't necessarily have to be convincing or well formed, but they have to be there. There has to be something that would follow the word "because" in a sentence.<sup>110</sup> There are many good reasons to require reasons. It is a check on judges to make sure they are rigorous and thorough in their resolution of a case.<sup>111</sup> Requiring reasons serves a public legitimacy function by providing some level of accountability to an otherwise undemocratic institution and ensures that the work of judges is done in good faith. As a more general legitimation move, reason-giving suggests to the world that law is an intelligible thing and that legal reasoning is different from the mere act of calling heads or tails, red or black, win or lose. Legal reasoning can't be conclusory.

The tension here is that the reasons judges give to explain or justify their holdings might often differ from the actual reasons that motivated their decisions (now a realist platitude). The quip of a judge's breakfast being the etiological cause of her decision could very well be true in the rare case, but no judge has yet been so candid about this.<sup>112</sup> Even our most culinary-inclined judges might not realize that an insipid omelet is what triggered their response to a case. This is all to say that a judge might not know precisely what informed her decision, or she might know that it's based in part on reasons that are not considered sufficiently legal and thus cite to other reasons that are acceptable in our legal culture. In most all cases, this is fine. What we generally care about is that the judge can justify her decision with an accepted reason and that lawyers or judges can then cite these same reasons to in resolving future similar cases. The actual etiology of decision-making might not matter if the judge can harness good "legal" reasons (i.e. based in legal precedent or employing other

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109. James Boyd White, *What's an Opinion for?*, 62 UNIV. CHI. L. REV. 1363, 1364 (1995). See also Mark Edwin Burge, *Without Precedent: Legal Analysis in the Age of Non-Judicial Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 143, 150 (asking us to "imagine a system without stare decisis or precedent.") (citing DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* 10 (2d ed. 2009)).

110. Schauer, *Giving Reasons*, *supra* note 64, at 636.

111. E.g., Lebovits, *Ethical Judicial Opinion Writing*, *supra* note 89.

112. Cf. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 410 (1985)

In its more extreme versions, Realism would maintain that sufficient precedents, some conflicting and many intersecting at various angles, exist so that an appellate judge can rationalize from precedent or written law a result conceived prior to consultation of that precedent or law. Under this view, a judge's own moral, political, psychological, Oedipal, or intestinal predilections determine the result.

*Id.*

accepted modalities of legal thinking) that maintain the perceived integrity of our legal system and common law method.<sup>113</sup>

I don't deride reason giving, but I do remind the reader that we are hunting for perfection. We can posit that because some causal reasons remain unknown to the judge-author or are otherwise un-articulable, forcing the judge to explain her decision lessens the cultivated zen that characterizes the effortless opinion.

#### VII. THE EPISTEMOLOGY OF EFFORTLESSNESS

The threshold problem of situating an opinion that lacks any reference to prior case law is more challenging. This is the under-theorized problem of how to identify an unexplained opinion rather than Schauer's concern about providing reasons that justify a decisional outcome. A distinguishing trait of the no-citation opinion is its effortless construction and its narrative approach to case framing. But the corollary epistemological problem is: how do we know what kind of case this is, and how can we test or validate its outcome if it lacks any citations to calibrate its reasoning? Judge Posner has commented on the modern difficulty of evaluating a case as "good" or "bad."<sup>114</sup> Professor Oldfather agrees that in our post-realist world, so long as a judge can justify her outcome by reference to legitimate forms of judicial reasoning (e.g., case law support), it is difficult to deride the outcome as "wrong."<sup>115</sup> The opinion that cites to case law has the arithmetic responsiveness we see in a math problem. We can check it against itself. The question presented in a judicial opinion justifies its own existence.

Although the no-citation opinion can potentially meet our perfection litmus of containing effortless writing and unstrained thinking, it is subject to the corollary problem of confirming how we can really *know* if its reasoning is sound or even relevant. I mentioned earlier the footprints in the *Abrams* dissent where Holmes refers to a network of case law that functions to contextualize and frame *Abrams* as a political speech First Amendment case, even if the prior case law is not directly relied on. A threshold explanatory move made by a judge is to reduce the case to a precise legal question so as to frame it for her analysis. This characterization situates the "monologic voice" (Ferguson) that the author

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113. Schauer, *Giving Reasons*, *supra* note 64, at 652-53 (1995); Oldfather, *Writing, Cognition, and the Nature of the Judicial Process*, *supra* note 98, at 1299-1300 (citing Martin P. Golding, *A Note on Discovery and Justification in Science and Law*, in JUSTIFICATION 124, 128 (J. Roland Pennock & John H. Chapman eds., 1986)).

114. RICHARD A. POSNER, *HOW JUDGES THINK* 3 (2008).

115. Oldfather, *Error Correction*, *supra* note 105, at 50-51.

can then utilize to abstract and decontextualize the textured facts of the case into a pure question of law. It is a contrivance to distance the judge as objective arbiter and create the ineluctable sense of there being only one possible answer.

This initial framing move doesn't read as a justification because it is a convention of opinion writing, but it is still a strategic move on the part of the author to situate the case and frame her responsive analysis.<sup>116</sup> This echoes discussion about the common metaphor of judges as umpires and debates as to whether they are simply "calling balls and strikes," or constructing the strike zone, or doing something altogether different (like serving as a commissioner<sup>117</sup> or being an aesthetic judge<sup>118</sup> as in figure skating, diving, etc.). But the realist perspective has a threshold critique: there are no balls or strikes until the umpire calls them. They are judicial constructions. The question I am curious about is not how a judge discerns a ball from a strike, or constructs the strike zone, but the conditional question of how a no-citation or exploratory opinion can adequately explain to us what game we should even be playing – what sort of opinion is this, and what is its goal?

Sometimes we celebrate the inventive framing of a case. No judge can control the facts of the particular case they receive, and most judges have little control over their personal docket (as cases are commonly assigned by a chief judge or distributed by an impersonal bureaucratic formula). This is what makes the Cardozo oeuvre so compelling. We lionize him for his ability to transform Scalia's "dog" into a "plum," as in his famous *Palsgraf* decision.<sup>119</sup> This judicial alchemy makes Cardozo an icon but also subject to critique from those like Judge Noonan, who argued that Cardozo lacked empathy and prioritized his own reputation as a judge over the parties to his cases.<sup>120</sup> That he chose doctrinal evolution over factual integrity.

In any event, we come across a core contradiction in this survey: what we do if the aspirational conventions of the perfect opinion and the merely

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116. Oldfather, *Writing, Cognition, and the Nature of the Judicial Process*, *supra* note 98, at 1315 (discussing psychology of how initial framing or presentation of information informs audience reception).

117. Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire*, 119 YALE L.J. ONLINE 113 (2009).

118. *See generally* *Adjudication in Aesthetic Sports*, *supra* note 8.

119. *See, e.g.*, JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 23 (1976) ("Judges like Holmes and Cardozo remain hidden as they transmute the tawdry materials of life into aesthetic masterpieces."). Judge Noonan later refers to *Palsgraf* as "the most famous tort case of modern times." But, importantly, it's not his favorite. *Id.* at 111.

120. *See generally id.* at 111-51.

great opinion are diametric. This is not a question of scale or emphasis but of polarity. The great opinion includes careful citation and shepherds the reader through the opinion by including a contextual fact and procedure section that prompts a discernable legal question and cites to articulable reasons to justify its outcome. The perfect opinion is instead a first descent into the first principles of our law, an adventure for reader and writer without the map of prior case law. What if the judge-author fails in this attempt for perfection? A future contribution to this literature on judicial perfection might be to chart the remote corners of Westlaw for the ambitious judge who simply failed in this mission for perfection. What do these opinions look like? Where do they go? Do these judges, or the law, suffer? We can fairly ask who should aim for perfection and consider the cultural question of what informs judicial reputation. How does the individual credibility of a judge frame our expectations of what sorts of legal (or non-legal) arguments she is allowed to make? How can we identify the judges who Posner suggests may go “beyond the conventional categories of legal thinking [and employ] a style equal to the range of considerations that they consider relevant”?<sup>121</sup>

We can assume that Posner includes himself in this category of the “beyond” judge. Indeed, Judge Wilkinson suggested that Posner’s style of judging works very well for him but that the majority of judges lack the intellect and panache to effectively pull off his pragmatic approach to dispute resolution.<sup>122</sup> Posner, of course, does not need my advice on writing. We can certainly learn from him and his own choice of favorites. As mentioned, one of them is Justice Holmes’ canonic dissent from *Lochner v. New York*.<sup>123</sup>

Holmes dives into the opinion. He doesn’t reframe it with a question prompt or write from authorial distance. Rather, he comments directly on the ulterior intellectual approach of the majority and considers a study plan for how he might form his own opinion on economic theory. He then reminds us this doesn’t really matter. It is a window into his interior monologue. It is unconscious thought.<sup>124</sup> This begins his masterstroke:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before

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121. Posner, *supra* note 5, at 1449.

122. J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY 80-103 (2012).

123. *Lochner v. New York*, 198 U.S. 45 (1905).

124. Indeed, there is some evidence for Unconscious Thought Theory, or the claim that unmediated, spontaneous writing can represent our best thinking. See, e.g., Oldfather, *Writing, Cognition, and the Nature of the Judicial Process*, *supra* note 98, at 1326 (2008).

making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.<sup>125</sup>

It is so natural as to feel like we've come across a diary entry or his personal correspondence. The references are so fresh that they are almost startling. No one will ever forget Herbert Spencer and his *Social Statics* after reading Holmes' dissent, even if Holmes never tells us what Spencer's book is about. We know that it's an ideology of one sort or another, and that ideologies are orthogonal to the concrete practice or interpreting a constitution. His points about police power, the Fourteenth Amendment, and judicial process each resonate even if he doesn't explicitly frame his analysis with a question presented or move deductively through his opinion. His dissent is cultivated spontaneity. It's thought in action. It's effortless – it's zen.

However, it is also a dissenting opinion. Although it meets many of our tests for the perfect opinion (written from first principles; effortless style; a zen sense of framing in which the author does not distort his actual thinking by explaining his instinctive sense of narrative argument to his audience), it also relies on implied reference to the facts and reasoning in the majority opinion. The more concerning problem is that Holmes "lost" this case. I am unsure if we can have a theory of law (here: that a perfect opinion exists, that at least some judges should aim for it, and that all of this is very good) that celebrates a non-majority opinion. A threshold test for any model of jurisprudence would seem to be if it creates *law*. This is basic quality control for a theorist. And Holmes' dissent, at least not until its constructive overrule in 1938, was not "good law." It wasn't mandatory authority anywhere, for anything.

I include one final qualification of the perfect opinion: It must be herculean. Ronald Dworkin famously created an ideal judge, Hercules, as a means to suggest the implicit normativity of our legal method.<sup>126</sup> In

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125. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

126. One of Ronald Dworkin's favorite examples of a "hard case" is of course *Riggs v. Palmer*, 115 N.Y. 506 (1889). Cf. *Understanding the Model of Rules: Toward a Reconciliation of Dworkin and Positivism*, 81 YALE L.J. 912, 919 n.12 (1972).

To leave the analysis at this may seem to elide almost all of the important questions about judicial decisionmaking [sic] those involving the institutional responsibilities of judges which are implicated in all decisions regarding the applicability and use of rules, and others concerning the appropriate ranking of values for various cases. But there is no answering these questions here; complex cases are the favorites of legal scholars, who will devote an entire essay to the dissection of just one.

Dworkin's words, "I have invented, for this purpose, a lawyer of superhuman skill, learning, patience and acumen."<sup>127</sup> It makes perfect sense to measure our potentially perfect opinions against Dworkin's vision because his theory is, after all, one of perfection.<sup>128</sup> Hercules is able to survey our expanse of available legal materials to channel the very best of the most relevant principles underlying our prior case law to form a *majority* opinion that is consistent with the integrity of the common law system.<sup>129</sup> Importantly, identifying these synthetic principles does not require precise citation to the cases they are manifested in. Rather, Dworkin articulated a "concept of principles that 'underlie' or are 'embedded in' the positive rules of law."<sup>130</sup> If our own human judge "is lucky, he may find, when he digs beneath the verbal surface of legal doctrine, the deep springs of the law."<sup>131</sup> Has one of our own ever enjoyed this apotheosis into Hercules?

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*Id.* (emphasis added). Per my count *Riggs* cited four cases – a modest number, but more than zero. In *Riggs* – and his other favorite hard case *Henningson v. Bloomfield Motors*, 32 N.J. 358 (1960) – "Dworkin sees courts interpreting the law in light of background principles as well as black-letter rules." David O. Brink, *The Forum of Principle*, 15 APA NEWSLETTER ON PHIL. & L. 1, 2 (2015). Each judicial opinion has been previously analyzed for its use of principled argument, and I have little more to add here at the moment. More importantly, they each rely on case law. And so perhaps surprisingly, these Hercules-inspiring judicial opinions are themselves not perfect given my inductively-arrived criteria. They are not truly *Herculean*.

127. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975).

128. *E.g.*, Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 283-85 (2004) (describing Dworkin's "aspirations of perfection").

129. *E.g.*, Dworkin, *supra* note 127, at 1082-83.

130. *Id.* at 1082-83.

131. Posner, *supra* note 5, at 1447.



## VIII. HERCULEAN OPINIONS

*“Grant for the sake of argument that what Hercules does is perfect.”*<sup>132</sup>

TABLE 3: HERCULEAN OPINIONS

Favorite Jurist	Favorite Opinion	Superlative language	Citations
Bryan Garner; and Charles Fried	<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943) (Justice Jackson)	“a thing of beauty” <sup>133</sup> (Garner) a favorite, or at least his favorite Jackson opinion (who he thinks is one of the three best writers on the SCOTUS) <sup>134</sup> (Fried)	Two, but maybe three
Judge Selya (self-citation)	<i>Levesque v. Anchor Motor Freight, Inc.</i> , 832 F.2d 702 (1987) (Judge Selya)	“my favorite” <sup>135</sup>	Zero
N/A (still unfavored)	<i>Springfield Gas &amp; Elec. Co. v. City of Springfield</i> , 257 U.S. 66 (1921) (Justice Holmes)	N/A	Zero

We have two herculean candidates. *West Virginia State Board of Education v. Barnette* is a favorite first principles majority opinion authored by Justice Jackson; the overlooked *Levesque v. Anchor Motor Freight, Inc.* is from Judge Bruce Selya of the First Circuit. Judge Lebovits noted Holmes’ own no-citation majority opinion in *Springfield Gas*, but unfortunately it has not (yet) been favorited, and so it can’t be a perfect opinion (at least presently).

Justice Jackson is an icon and has a deserved reputation as being a wonderful writer. Indeed, Jackson is cited by a majority of the current U.S. Supreme Court justices to be “their favorite writer ever to serve on the

132. Don Herzog, *Cute Prickly Critter with Presbyopia*, 110 MICH. L. REV. 953, 962 n.18 (2012) (emphasis added).

133. Bryan A. Garner, *Celebrating the powerful eloquence of Justice Robert Jackson*, ABA JOURNAL (Oct. 2016), [http://www.abajournal.com/magazine/article/powerful\\_eloquence\\_justice\\_robert\\_jackson](http://www.abajournal.com/magazine/article/powerful_eloquence_justice_robert_jackson) [<https://perma.cc/WX5J-YZZG>].

134. Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 647 (2011) (“Justice Jackson made some of the best and boldest decisions in the whole of our constitutional jurisprudence—my particular favorite is *West Virginia State Board of Education v. Barnette*...”).

135. Bruce M. Selya, *In Search of Less*, 74 TEX. L. REV. 1277, 1277 (1996).

court.”<sup>136</sup> In his 2017 contribution to the *Stanford Law Review*, former Solicitor General Gregory G. Garre observed that “some of [Jackson’s] opinions are regarded as among the finest writings of the Supreme Court.”<sup>137</sup> For Garre, “much of the force of his opinions comes from his focus on first principles and aversion to ‘legalese.’”<sup>138</sup> Posner agrees that Jackson “cultivated a plain style with great success.”<sup>139</sup> We should understand “plain” in the distinct sense of effortless and candid. Jackson was an aesthete in the total sense, and “surely the only Justice to be named best dressed man in America by the Custom Tailors Guild.”<sup>140</sup>

Solicitor Garre’s reference to first principles echoes my theorizing in this Article, but I want to unpack a connection between writing theory and psychology that might explain this core trait of Jackson’s writing. Unconscious Thought Theory suggests that in certain contexts, unmediated, spontaneous thinking might be our best thinking and that deliberation can obscure or wooden the zen vitality of our original idea. We probably all share experiences where our “first take” was our best, but, as academics, we are aware of the Robert Graves aphorism, “there is no good writing, only good rewriting.” However, there is evidence that in certain limited contexts, our zen thoughts are our best thoughts: “the Unconscious Thought Theory literature suggests that the benefits of unconscious thought are achieved after the information necessary to a decision is carefully absorbed.”<sup>141</sup> For our purposes, this theory suggests that the judge with accreted wisdom that comes from years of work in the law (tacit knowledge) might craft the effortless masterstroke from first principles, whereas the judicial novice lacks this same cultivated instinct and must labor from conventional sources of law.

Justice Jackson’s varied experience (including as solicitor general, attorney general, chief prosecutor in the Nuremberg trials) provides an especially robust base of tacit knowledge from which to operate. This “situation sense” (à la Llewellyn) manifests in his ability to re-contextualize the Korean War steel seizure facts into a first principles meditation on the fluid nature of comparing presidential v. congressional powers in the special terrain of national security law. In *West Virginia*

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136. Garner, *supra* note 133 (“Doubtless because Jackson was so unusually eloquent, a majority of the current justices name him as their favorite writer ever to serve on the court.”).

137. Gregory G. Garre, *Lessons from “America’s Advocate,”* 69 STAN. L. REV. 1795, 1807 (2017).

138. *Id.*

139. A STUDY IN REPUTATION, *supra* note 7, at 140.

140. Fried, *supra* note 134, at 649.

141. Oldfather, *Writing, Cognition, and the Nature of the Judicial Process*, *supra* note 98, at 1326.

*State Board of Education v. Barnette*, Jackson masterly connects the precise factual prompt of whether public school students can be required to salute the American flag to a synthetic look at the nature of symbols and their function in society:

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.<sup>142</sup>

He discerns the core connection between communication and speech that explains the relevance of symbols to First Amendment doctrine. Justice Jackson then reflects on how the social value of symbolic communication can compete with the individual's freedom to determine her own thoughts and beliefs. This is first principles theorizing on the nature of personality and the reserved right of the individual to construct her own identity. This does not require citation, and perhaps does not even have discrete case law to cite to. This is embedded in our Constitution's design as a document that preserves individual autonomy separate from the reach of the state and perhaps manifests in the penumbras of the First Amendment, notions of substantive due process and the overlooked text of the Ninth Amendment.<sup>143</sup> Jackson writes:

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind ... To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.<sup>144</sup>

Of course, we *cannot* let public officials dictate the contents of our minds. This is itself a very important thought, and thus must be made in the best judicial prose. As confirmed by premier stylist Bryan Garner, *Barnette* is a "a thing of beauty."<sup>145</sup> Garner also notes that for an "eight-page opinion,

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142. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

143. See Justice, *supra* note 79, at 1241 (discussing his favorite opinion, Justice Goldberg's concurrence in *Griswold v. Connecticut*, because "of its frank discussion of the role of the Ninth Amendment in constitutional interpretation"). *Id.* at 1241.

144. *Barnette*, 319 U.S. at 633-34.

145. Garner, *supra* note 130.

Jackson quotes very little and cites only two cases.”<sup>146</sup> I count three cases, but either way, Jackson is concerned with general principles more than data points and writes with a purview that transcends the immediate details of the case. It is an incomparable majority opinion, and it might be perfect. However, I do point out Garner’s own reservation! Jackson uses the clunky word choice of “therein” three times in *Barnette*.<sup>147</sup> “No one is perfect,”<sup>148</sup> even if our rare opinion might be.

I quickly remark on how Justice Jackson’s favorited opinions seem to synthesize his thinking on constitutional design with embedded principles of American democracy. Holmes’ reference to our “experiment” with self-government in *Abrams* is a similar argumentative move. This citation to our identity as a democracy and our vision of a free people can be interpreted as a form of ethical argument put forward by Philip Bobbitt. In *Constitutional Fate*, Professor Bobbitt outlines his typology of constitutional reasoning in the U.S. Supreme Court.<sup>149</sup> Of particular note for this Article is the Bobbitt modality of “ethical reasoning,” in which the Court reasons from our American *ethos* of national identity. Examples of ethical reasoning potentially include the description of Manifest Destiny in *McCulloch v. Maryland*<sup>150</sup> or the reference to the Dr. Kenneth and Mamie Clark’s “doll experiment” in *Brown v. Board of Education*, including its implied sense that we—as a nation—cannot tolerate a segregated existence that fosters a sense of inferiority among black schoolchildren.<sup>151</sup>

Neither the concept of Manifest Destiny nor social psychology are conventional forms of legal authority. However, the doll experiment’s implied value as a barometer of the Fourteenth Amendment and our constitutional core principle of equality before the law give it a legal valence that is not true of Manifest Destiny, or the purely instrumental argument based in economic thinking.<sup>152</sup> I make this clarification to provide some content to our definition of what sorts of legal materials the herculean judge may fairly refer to when discerning the general principles

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146. *Id.*

147. *Id.*

148. Garre, *supra* note 137, at 1807 n.76 (2017) (“No one is perfect—Jackson ‘liked the word therein.’”) (quoting Garner, *supra* note 133).

149. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3 (1982).

150. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819).

151. Philip Bobbitt, *Methods of Constitutional Argument*, 23 U. BRIT. COLUM. L. REV. 449, 454-55 (1989).

152. But see Harry T. Edwards, *The Growing Disjunction Between the Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 48 n.40 (1992) (“Another former law clerk mused: ‘Law & economics is to some degree helpful in practice, especially if you’re arguing in the 7th Circuit. Otherwise I don’t see much direct benefit to practice.’”).

in our law; to distinguish the principles integral to our positive law from other values or forms of reasoning which are separate.

#### IX. REVISIONING *LEVESQUE*

Judge Bruce Selya's majority opinion in *Levesque v. Anchor Motor Freight, Inc.*,<sup>153</sup> blurs the "fun" with the "herculean" opinion. It transcends itself by seeming to poke fun at the genre of the judicial opinion and its usual conventions. I am unsure if it's great, yet it might indeed be perfect.

For those unfamiliar with this lexophile senior judge from the First Circuit, I introduce him by his most identifiable gift – his incredible vocabulary. Here is a 1992 *New York Times* write-up:

In Judge Selya's linguistic armamentarium, various entities may be described as exiguous (meager), struthious (ostrich-like), neoteric (modern, recent) or inconcinnate (unsuitable, awkward). His world is populated with people who are forever repastinating (digging again), resupinating (turning upside down), prescinding (withdrawing attention from), perfricating (rubbing thoroughly) or vaticinating (prophesizing).<sup>154</sup>

Judge Selya is idiosyncratic, but is he an icon? It appears that other federal judges think he might be. According to one empirical study from Professors Stephen Choi and Mitu Gulati, Selya was the fourth most-cited federal appellate judge outside her home circuit from 1998-2000 (behind only Richard Posner, Frank Easterbrook and Sandra Lynch).<sup>155</sup> Selya would not be surprised by his inclusion in this rarefied list. He is his own favorite judge.

In a 1996 *Texas Law Review* symposium issue on favorite judicial opinions,<sup>156</sup> the Honorable Bruce Selya selected his own opinion for the court in *Levesque v. Anchor Motor Freight, Inc.*<sup>157</sup> Most judges at least feign humility. It is rare for a judge to indulge in this personal sort of hagiography in the pages of a law review. Given my own theory of perfection, I can't disagree with the reason for his self-citation:

153. *Levesque v. Anchor Motor Freight, Inc.*, 832 F.2d 702 (1987).

154. David Margolick, *At the Bar: Sustained by Dictionaries, a Judge Rules That No Word, or Word Play, is Inadmissible.*, N.Y. TIMES, Mar. 27, 1992, at B16, <https://www.nytimes.com/1992/03/27/news/bar-sustained-dictionaries-judge-rules-that-no-word-word-play-inadmissible.html> [<https://perma.cc/KW8R-3NM8>].

155. Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 NYU ANN. SURVEY OF AM. L. 19, 28 (2005) (more precisely, the fourth most-cited federal appellate judge by other federal judges from outside the judge's home circuit from 1998-2000).

156. Selya, *In Search of Less*, *supra* note 135, at 1277.

157. *Levesque v. Anchor Motor Freight, Inc.*, 832 F.2d 702 (1987).

There is one thing--and one thing only--that redeems *Levesque* and distinguishes it from the mine-run of opinions which crowd the pages of the Federal Reports: it is the only full-dress, published appellate opinion of which I am aware that contains no citations. . . not a case, not a treatise, not a statute, not a law review article.<sup>158</sup>

There is a reflexive move in Selya citing his own no-citation opinion as a favorite. The first principles judge signals to the legal reader that she possesses the transcendent sense of the inner workings of the common law.<sup>159</sup> At the same time, the legal reader trusts that if a judge writes with this sort of effortless confidence, then she must necessarily be a gifted judge. The first principles judge does not write from anxiety but from the wisdom of tacit knowledge.<sup>160</sup>

Judge Selya begins his own masterstroke:

In this personal injury suit, David A. Levesque, plaintiff-appellant, sought to recover damages from Anchor Motor Freight, Inc. (Anchor) and Joseph Tobin, defendants-appellees. The controversy arose in consequence of an accident which took place on March 14, 1984. Briefly stated, on that day Tobin (an employee of Anchor) drove a multi-level car carrier, fully loaded, to a dealership in Cranston, Rhode Island. After parking in the dealership's lot, he began unloading the nine spanking new chariots which comprised this shipment.<sup>161</sup>

There are two notable takeaways from this excerpted section. First, this is a run-of-the-mill negligence case. It does not involve existential threat, moral conflict or the “hard case” of conflicting authority in equipoise. Selya still aims to reason from first principles embedded in negligence doctrine. Torts professors now have evidence for their Constitutional Law colleagues that their subject area transcends itself.

158. Selya, *In Search of Less*, *supra* note 135, at 1278 (though of course he misses *Springfield Gas & Elec. Co. v. City of Springfield* as a second no-citation majority opinion).

159. *Cf. Primus*, *supra* note 34, at 258-59.

The great Justice hypothesis has initial plausibility. Harlan, Holmes, and Brandeis were great Justices, and, in their opinions, authorship often seems to become authority. A question immediately arises, however, as to why those Justices are considered great in the first place. Is it not at least partly because they wrote great opinions, including, and perhaps especially, great dissents? If that is so, as it surely is, then the great Justice theory risks circularity.

*Id.*

160. See Shane Tintle, *Citing the Elite: The Burden of Authorial Anxiety*, 57 DUKE L.J. 487, 500-01 (2007) (describing citation as reflective of a semiotics of anxiety, and the need to compensate for lack of confidence).

161. *Levesque*, 832 F.2d at 702-03.

The other takeaway is that Selya is having some fun with this opinion, as reflected in the hyperbole of “nine spanking new chariots.”<sup>162</sup> This language is not an outlier. Rather, Selya writes that plaintiff sued to “assuage his hurts”<sup>163</sup>, writes that defendant’s testimony was “less than exquisitely revelatory”<sup>164</sup>, and sprinkles his opinion with platitudes like “but life is not so simple”<sup>165</sup> and repartees such as “it beggars credulity.”<sup>166</sup> This language is consciously baroque and didactic and would probably be perceived by most readers (especially parties to a case) as condescending. But perhaps Judge Selya is empathic to these parties and is instead reflecting on the nature of his occupation. He also inserts turgid language and jargon that could be read as commentary on the usual affectations of lawyerly writing; for example, his use of “ergo,”<sup>167</sup> “nisi prius roll,”<sup>168</sup> “no rational venireman,”<sup>169</sup> “ideocratic,”<sup>170</sup> or “the jury verdict should [not] be jettisoned.”<sup>171</sup> This opinion is a sort of post-modern critique on bureaucracy and court process. It is sphinxlike.

Other times Judge Selya seems to write with elegance on deep questions of epistemology in fact determination, the exact same sort of problem we struggled with earlier when thinking about cognition and reason-giving. Selya reminds us of the basic inscrutability of life and the limits of technology:

There is no computer printout which can tell us the precise number of seconds that one must look before he leaps. Jurors, using common sense and collective experience assess credibility and probability, and proceed to make evaluative judgments, case by case: challenged behavior is or is not negligent. Indeed, this is the quintessential stuff of which jury questions are fashioned.<sup>172</sup>

Is this how Judge Selya portrays modesty? He again argues for judicial restraint: “the ‘perhapses’ which dot this cryptic record are for factfinders to resolve—not for judges imperiously to dictate.”<sup>173</sup> Just as we think we might be able to discern an identity for this curious opinion, to distinguish

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162. *Levesque*, 832 F.2d at 703.

163. *Id.*

164. *Id.* at 703.

165. *Id.* at 704.

166. *Id.*

167. *Levesque*, 832 F.2d at 703.

168. *Id.* at 703.

169. *Id.* at 704.

170. *Id.*

171. *Id.*

172. *Levesque*, 832 F.2d.

173. *Levesque*, 832 F.2d at 704.

it as either self-indulgent or instead a first principles meditation on the nature of judging, it ends (but with poetic use of space):

We need go no further. The district court properly submitted the negligence issue for jury consideration and acted within its discretion in denying plaintiff's posttrial motion to upset the verdict. The judgment below must be

*Affirmed.*<sup>174</sup>

Selya concludes his opinion in the elliptic manner that he must. This is not the only time Judge Selya has observed the bureaucratization of judicial work. In *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, Selya wrote persuasively on how increased workload has transformed judges “from thinkers to managers.”<sup>175</sup> In short, that the ideal of the sage-judge is being corroded by the busywork of writing facile opinions like *Levesque*. The many “easy cases” that Frederick Schauer reminded us of (e.g., no thirty-four-year-old will ever be inaugurated as president)<sup>176</sup> are meant to be disposed of *before* they enter the courtroom. They are not meant to be written about on appeal.

In some ways *Levesque* reads as an inside joke Selya wrote only for himself (though it has been cited at least eleven times by later courts,<sup>177</sup> even if several of these are self-citations).<sup>178</sup> It also could be read as dismissive of the work of prior judges who thought hard about these same questions of law and fact, and whose work should be cited as a courtesy. Judges are socialized to the norm of *stare decisis*,<sup>179</sup> and the habit of citation becomes hard-wired into their thinking.<sup>180</sup> When a judge ignores prior case law, we can read this as an intentional choice. The judge is not

174. *Id.* at 705.

175. Selya, *Publish and Perish*, *supra* note 8, at 406-07.

176. *See, e.g.*, Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 420 (1985).

177. Other judges have cited *Levesque* in: *MacQuarrie v. Howard Johnson Co.*, 877 F.2d 126, 131 (1989); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 558 (1989); *Bezanson v. Fleet Bank of New Hampshire*, 45 F.3d 423, \*423 (1995) (unpublished per curiam opinion); *Smith & Nephew Dyonics v. Smith & Nephew Dyonics*, 62 F.3d 8, 14 (1995); *Astro-Med, Inc. v. Nihon Kohden America, Inc.* 591 F.3d 1, 13 (2009); *Kenney v. Head*, 670 F.3d 354, 360 (1st Cir. 2012); *Guzman v. Boeing Company*, 366 F.Supp.3d 219, 246-47 (2019).

178. Judge Selya has cited *Levesque* in: *Kassel v. Gannet Co. Inc.*, 875 F.2d 935, 943-44 (1989); *La Amiga del Pueblo, Inc. v. Robles*, 937 F.2d 689, 691 (1991); *Casa Marie Hogar Geriatrico, Inc. v. Rivera-Santos*, 38 F.3d 615, 619 n.3 (1994); *Blinzler v. Marriott Intern., Inc.* 81 F.3d 1148, 1153 (1996).

179. Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 954 (2008); Frank B. Cross, et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 497 (2010).

180. Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 11 (2002).



making a mistake, but instead implies that what others conventionally do—citing to and reasoning from discernable authority—is somehow worthy of critique. The no-citation judge is bringing attention to herself, perhaps to suggest that citation is (at least sometimes) silly, pedantic, trivial or enervating. This does not mean it is necessarily “bad form”<sup>181</sup> for Selya to avoid citation. Maybe this opinion itself is a play on the genre, and is meant to help his colleagues by reminding all of the legal community how bureaucratic pressures are competing with our envisioned role of judges as thinkers and writers.

Selya knows he is doing something unconventional by avoiding all citation. Just in case his playful approach is not obvious to all readers, he includes a final clarifying footnote:

It is no accident that this opinion is bereft of a single explicit citation to any statute, rule, or reported decision. The matter is a fact-intensive one. The only principles of law implicated in the case are so well settled as not to require citation of authority. Rather than exhibiting any lack of scholarship on our part, we view the pristine nature of these pages as a testament to our steadfast unwillingness to confer epicurean status on the bland and undistinguished fare which appellant has served up for our consideration.<sup>182</sup>

Selya echoes the purist position on citation to case law and our earlier distinctions between citing authority as illustrative reference as opposed to reasoned basis. We should not cite to authority simply because it’s there and it’s relevant. Instead, we should only do so when that cited authority somehow informed our thinking – because it educated us or because the cited authority unexpectedly bound us. We should not cite to it simply as an ornament or an illustration of a mundane point of law. As someone writing on the value and use of citation, I find his thinking in this footnote provocative. As someone chasing the perfect opinion, I find this clarification to lack the intrepidity required of perfection. The perfect opinion justifies itself without explanation. It is beyond our epistemologies of self-validation, either that of citation or discursive footnote. It is an existential leap of faith.<sup>183</sup>

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181. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (“[W]e would consider it bad form to ignore contrary authority by failing even to acknowledge its existence...”).

182. *Levesque*, 832 F.2d at 705, n.5.

183. Holmes concludes his no-citation *Springfield Gas* is relatively effortless, but still a bit self-aware. *Springfield Gas & Elec. Co. v. City of Springfield*, 257 U.S. 66, 71 (1921) (“It is unnecessary to refer to the numerous cases upon classification by state laws in order to show that the distinction in question here is very far from being so arbitrary that we can pronounce it bad.”).

Selya addresses these epistemological concerns in his *Texas Law Review* symposium article by confirming that his reasoning in *Levesque* depended on “legal propositions [that are] ... well-settled.”<sup>184</sup> Again, our broader framing question: how does Selya know that a proposition is well settled and that he has accurately identified it? Selya avoids citation to authority for prosaic points about black-letter negligence doctrine, but he writes with vivid metaphor (our hypothetical supercomputer that quantifies fine distinctions in carelessness) to limn the general principles that inform his decision, i.e. jury verdict stands. Our negligence heuristic is a rough proxy for shared notions of causality and practical morality, and our standards of review reflect broader ideas about triers of fact and court hierarchy. These are big ideas. They are referred to elliptically and by example. This makes Selya’s opinion literary but not necessarily subject to external validation.

Because of the epistemological problems involved in evaluating the unexplained first principles opinion, I argue that perfection can only be determined by the future audience. *Levesque* has since been cited by eleven cases and has not yet been overturned. In the language of citation studies, this “counts” for something. *Levesque* also remains a charming opinion; it has a jocular spirit, and it marshals this same wit to articulate insightful truths about the role of judge. Still, it is too self-aware to meet our test of effortless zen. It comments on its own use of language in a way that makes it feel strained.

Time is our best judge of what endures. The first principles approach of the favorite opinion allows it to transcend doctrine. In addition, “the sparkling, vivid, memorable opinion is not so chained to the immediate context of its creation.”<sup>185</sup> Because of its literary quality, it “wears best over time.”<sup>186</sup> The novel metaphor does not have a provenance, and this helps to explain why *Abrams* is sparsely cited. The “marketplace of ideas” imagery continues to inspire productive thinking about the meaning of the First Amendment. With hindsight we can also unpack certain imperfections in this metaphor. Courts that “invoke the marketplace model of the first amendment justify free expression because of the aggregate benefits to society,” despite a plain reading that would suggest it is an individual right.<sup>187</sup> We lose some precision in the contours of the First

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184. Selya, *In Search of Less*, *supra* note 135, at 1278.

185. A STUDY IN REPUTATION, *supra* note 7, at 143.

186. *Id.*

187. Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 27 (1994) (citing Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4 (1984)).

Amendment in this shift to group benefit. Favorite opinions are literary, but there remain core differences between legal and literary modalities of explaining our world. With time, the limits of metaphor can manifest.<sup>188</sup>

#### X. FUTURE FAVORITES AND THE PROBLEM OF PERFECTION

It will be interesting to observe which opinions from today become the favored opinions of tomorrow. Will Justice Kennedy's transcendental reflections on dignity, love and selfhood be canonized?<sup>189</sup> Or will the "mad genius"<sup>190</sup> of his first principles approach in *Windsor* be derided as specious?<sup>191</sup> Will Judge Posner's photographic reference to an ostrich in *Gonzalez-Servin*<sup>192</sup> make it a fun opinion in West Publishing's next iteration of *Blackie the Talking Cat*, or will it instead be remembered as a petty move to embarrass counsel for ignoring on-point precedent? These questions will depend on the identity of future audiences. As the demographics of our judges evolve to reflect the diversity of those judged, perhaps there will be corollary changes to our catalog of favorites. Our first principles depend on the tacit knowledge of the individual judge, which is of course informed by personal history.

A more troubling jurisprudential question is how foreign authority and non-legal authority will be used and valued. Citation is an aesthetic of legal writing, and we expect opinions to look a certain way. It is a semiotics of credibility and power. But debates about the use or value of foreign authority, or traditionally non-legal materials like social science, dictionaries, or *Wikipedia*, are not so much about citation, but about a rule of recognition as to what are valid sources of authority in our legal culture.<sup>193</sup> In contrast to the H.L.A. Hart position that there is a singular rule of recognition that determines binding authority,<sup>194</sup> I argue that given

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188. E.g., Pierre N. Leval, *Judicial Opinions as Literature*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, 206, at 211 (1996).

189. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2599-2600 (2015).

190. See, e.g., Heather K. Gerken, *Windsor's Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 588 (2015) ("The genius of the opinion is that it recognizes that rights and structure are like two interlocking gears, moving the grand constitutional project of integration forward.").

191. *United States v. Windsor*, 570 U.S. 744 (2013).

192. *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) ("The ostrich is a noble animal, but not a proper model for an appellate advocate.").

193. E.g., Schauer, *Authority and Authorities*, *supra* note 24, at 1959 (2008).

194. H.L.A. HART, *THE CONCEPT OF LAW* 91-94 (2d ed. 1994). See also Scott Shapiro, *What is the Rule of Recognition (and Does it Exist)?*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 237 (Matthew Adler & Kenneth Himma eds., 2009) ("Legal systems address the problem of uncertainty by providing a rule which determines which rules are binding.").

the contextual nature of source-based arguments from authority, this singular rule is better conceived as a set of operating *rules* that give credibility to varied kinds of sources.<sup>195</sup> These rules are socially constructed and reflect an interplay of novel references and perceived receptions to them (they are “Wittgensteinian” in this way).<sup>196</sup> A court with pedigree can claim a new source of authority simply by citing to it. Frederick Schauer and Virginia Wise share the example of how it had been traditionally unacceptable for English courts to cite to a living scholar.<sup>197</sup> Once the first English appeals court cited Arthur Goodhart, Professor of Jurisprudence at Oxford, in *Hannah v. Peel*<sup>198</sup> the practice of citing living secondary authority gradually became a convention.<sup>199</sup> Still, our assumption is that when a judge cites to this kind of novel secondary authority, or foreign or non-legal authority, that she is making the limited claim that these sources are useful commentary or fodder for good ideas.<sup>200</sup> Not that they are *law*.

When our favorite judges discern the first principles of our law, they are making an empirical claim that these principles underlie, and are integral to, our positive law. The first principles judge is not channeling an indiscernible “brooding omnipresence in the sky”<sup>201</sup> but drawing on something autochthonic to our legal culture.

This empirical claim can be a profound one about the meanings of equality (*Korematsu*), freedom of speech (*Abrams*), freedom of personality (*Barnette*) or executive power (*Youngstown Steel*) embedded in the spirit or design of our Constitution. Or it can even be the more modest empirical claim of black-letter doctrine (*Levesque*), where facile use of a string citation would only exacerbate the perception that our judges are just purveyors of pincites, our “principle asset” of the law.<sup>202</sup> The aesthetic choice then becomes *not* to cite. Selya also steps outside of

195. E.g., JOSEPH RAZ, THE AUTHORITY OF THE LAW 97 (“[E]very legal system rests on its laws, which commonly means on a set of ultimate *laws* of recognition and discretion”) (emphasis added).

196. See Frederick Schauer & Virginia J. Wise, *Legal Positivism and Legal Information*, 82 CORNELL L. REV. 1080, 1089 n.42 (1997).

197. *Id.* at 1088.

198. *Hannah v. Peel*, 1 K.B. 609 (1945).

199. *Id.*

200. See, e.g., Justice Ruth Bader Ginsburg, *Speech at the American University International Academy of Comparative Law: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication* (July 30, 2010), [https://www.supremecourt.gov/publicinfo/speeches/view/speech/sp\\_08-02-10](https://www.supremecourt.gov/publicinfo/speeches/view/speech/sp_08-02-10) [<https://perma.cc/NUJ5-SUL7>] (describing exchange during Justice Kagan’s nomination hearing when she confirmed she is “in favor of good ideas coming from wherever you can get them,” including by reading the decision of a foreign court).

201. *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

202. Cross, et al., *supra* note 22, at 493.

his *Levesque* opinion as a participant-observer and speaks first principles aphorisms (however banal) to announce this is a special case. For Selya, the very mundaneness of *Levesque* indicates the profundity of the problem: why am I required to write this? To defer to case law would not be wise but a rote exercise to achieve the look of judicial writing that we have come to expect.

The problem is how to cabin off which “deep springs” we can refer to. The positivist’s claim is essentially a limited domain thesis.<sup>203</sup> That there is a contained universe of valid sources of legal information, and that we cannot look to things that aren’t there when making legal decisions. There must be palpable, verifiable law. Those like Judge Posner who instead argue that the law is not an autonomous domain permit themselves to go beyond these conventional categories.<sup>204</sup> Again we can fairly ask: who is allowed to go beyond, and how far can they go? Lon Fuller’s innovation was to construct a natural law theory within our internal morality of procedural norms rather than to look to extra-legal values like religion or the “good life” etc.<sup>205</sup> As our legal culture evolves to consider new sources of authority<sup>206</sup> and as our world of legal information expands with the sprawl of our Internet search engines,<sup>207</sup> it becomes difficult to distinguish legitimate unarticulated law from illegitimate unarticulated law. This is the epistemological problem of defining something we can’t see. It’s our old trope of “where do we draw the line.”

One conclusion of this Article would seem to be that judges should cite less. But we should also worry that as our universe of citable authority expands to include new sources, the sparsely cited opinion might not rely on grounded principles that are sufficiently legal. Justice Breyer tells the story of the congressperson who tolerated Breyer’s study of foreign materials so long as he did not disclose this inspiration in his opinions.<sup>208</sup> If Breyer can still rationalize his argumentative move with reasons based in our own set of citable legal authorities, then he can at least maintain the perceived integrity of our legal system. If no prior case has been decided on this same foreign principle, then the congressperson’s suggestion of an

203. Schauer & Wise, *supra* note 196, at 1088-93.

204. *Id.* at 1098.

205. LON FULLER, *THE MORALITY OF LAW* (1964).

206. See, e.g., Bezalel Stern, *Nonlegal Citations and the Failure of Law: A Case Study of the Supreme Court 2010-11 Term*, 35 WHITTIER L. REV. 79 (2011) (identifying 295 citations to conventionally non-legal authorities such as academic articles from other disciplines, dictionaries, newspapers and internet and video sources).

207. E.g., Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 313 (2000).

208. *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 522-23 (2005).

un-cited opinion is the more dangerous one, as we lose our grasp on our internalized set of first principles. At least in opinion writing, it seems that perfection is indeed the enemy of the good. This should make each judge pause before authoring an opinion without citation, even our very best ones.